STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1707

State of Minnesota,
Respondent,

vs.

Lavell Ramone Porter,
Appellant.

Filed September 17, 2018
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-16-24622

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Tyler Bliss, Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Appellant Lavell Ramone Porter challenges his convictions of kidnapping, first-degree criminal sexual conduct, and first-degree assault, arguing that he received ineffective assistance of counsel, that the district court abused its discretion by denying his

request for a continuance two days before trial, and that he is entitled to a new trial due to a *Brady* violation. Because we determine that appellant received effective assistance of counsel, that the district court did not abuse its discretion when it denied appellant's request for a continuance, and that there was no *Brady* violation, we affirm.

FACTS

Victim A.C.T. and appellant were in a romantic relationship beginning in 2010. A.C.T. has three children, two of whom she had with appellant. Physical abuse was a persistent feature of A.C.T.'s relationship with appellant. The abuse included shoving, strangulation, and controlling behavior. On May 21 and 22, 2016, appellant assaulted A.C.T. in a public park and then in a basement, prevented her from leaving the basement, and sexually assaulted her before and after physically beating and terrorizing her.

The state charged appellant with kidnapping, first-degree criminal sexual conduct, and first-degree assault. A jury trial was held in June 2017. Two days before trial, appellant requested a continuance to listen to jail calls made between A.C.T. and appellant after appellant's arrest. Appellant argued that the state disclosed a large digital file containing the recordings of the jail calls, but that the file did not indicate the dates or times of the calls. Appellant's trial counsel also indicated she was unable to listen to the digital recordings of the calls. The state argued that it disclosed the calls four months prior to trial and specifically identified a particular call appellant should review. The state also said it was not informed of appellant's counsel's difficulty in reviewing the calls until appellant requested a continuance two days before trial. The district court denied the request for a continuance and ordered the state to make the calls available to appellant in a format that

would be easily reviewable. The district court also found that appellant was on notice of what was contained in the jail call recordings because he personally participated in those conversations. Finally, the district court noted that appellant's counsel would have enough time to review the calls during jury selection.

At the conclusion of trial, the jury found appellant guilty of kidnapping, first-degree criminal sexual conduct, and first-degree assault. After trial, appellant filed a motion for a new trial on the basis of a *Brady* violation. Specifically, appellant alleged that the state failed to disclose a portion of an interview during which A.C.T. stated she did not believe appellant intended to rape her. The district court concluded that it did not believe that the state cherry-picked the contents of that interview, and the record indicated that the essence of the entire conversation was disclosed. The court further found that it did not believe the state directly asked A.C.T. if she believed appellant intended to rape her, a conclusion supported by an affidavit from the victim advocate, who was present for the interview. Also, the district court found that, even if the undisclosed fact existed, appellant was not prejudiced because A.C.T.'s alleged belief that appellant did not intend to rape her was irrelevant. Furthermore, such evidence was cumulative with information contained in the jail calls, wherein A.C.T. expressed that she thought he did not intend to rape her.

A jury convicted appellant of kidnapping, first-degree criminal sexual conduct, and first-degree assault. Appellant was sentenced to 270 months in prison. This appeal followed.

D E C I S I O N

I. Appellant received effective assistance of counsel.

When evaluating an ineffective-assistance-of-counsel claim, this court applies the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (applying the *Strickland* test to claims of ineffective assistance of trial counsel). The first prong requires an appellant to show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2052. The second prong requires appellant to show that "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. 2052. Both prongs must be met. *Id.* at 687, 104 S. Ct. at 2052. "There is a strong presumption that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2052).

A. Jail Calls

Appellant first argues that he received ineffective assistance of counsel because his attorney did not investigate the jail calls during the four months leading up to trial, citing *Rompilla v. Beard* to support his argument. 545 U.S. 374, 125 S. Ct. 2456 (2005). In *Rompilla*, the court found the attorney's representation was "obvious[ly]" below the objective standard of reasonableness because she failed to review a file containing information about her client's prior convictions in a case where the state was pursuing the death penalty, a punishment requiring a showing of prior violent criminal acts. *Id.* at 383,

125 S. Ct. at 2464. In this case, the jail calls contained much less important evidence than the criminal history file in *Rompilla*, and even if they had been reviewed by appellant's attorney and used at trial, there is likely not a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2052. The jail calls submitted by the state contain two conversations between appellant and A.C.T. On the first call, appellant asked A.C.T. to recant her testimony on the stand, and she declined. Also on that call, A.C.T. expressed her belief that appellant did not intend to rape her. On the second call, A.C.T. asked appellant why he told police that she had taken ecstasy and claimed that she had not taken the drug on the night of the offense.

The evidence contained in the jail calls, when viewed in the light of the entire body of evidence against appellant, is unlikely to have changed the outcome of the proceeding. Whether A.C.T. believed appellant did not intend to rape her is irrelevant, because her belief about appellant's state of mind is not at issue in the case and does not tend to prove any fact at issue in the case. The district court agreed when it stated that it would not have admitted such evidence even if it had been offered, because A.C.T.'s opinion about appellant's state of mind is irrelevant and misleading.

On the second jail call, A.C.T. claimed she never took ecstasy the night of the offense. This evidence could have been used to impeach A.C.T.'s trial testimony; however, the evidence contained in the jail calls was scant compared to A.C.T.'s own trial testimony of the events and the photographic evidence of her injuries. A.C.T.'s testimony with respect to the details of the offense was consistent with her statements to police, and she never recanted her testimony, even though she was urged to do so by appellant.

Appellant's claim of ineffective assistance of counsel fails because, even if appellant's attorney had investigated the jail calls, there is no reasonable probability that their use at trial would have changed the outcome of the case. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2052.

B. Expert Witness

Appellant next argues that counsel's failure to call a medical expert to testify about A.C.T.'s alleged nerve damage in her hand constituted ineffective assistance of counsel. The damage to A.C.T.'s hand is relevant to the first-degree assault conviction because that crime requires a showing of great bodily harm. Great bodily harm means "bodily injury which creates the high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2016).

Appellant's attorney's failure to call a medical expert to testify about A.C.T.'s alleged nerve damage had no impact on the verdict. The state argued that A.C.T. suffered great bodily harm based on the wide range of injuries she suffered at appellant's hands. Those injuries included facial beatings until A.C.T.'s eyes were swollen shut, repeated strangulations, a period of unconsciousness, coughing up blood, bleeding from her ears, involuntary urination, self-reported "nerve damage" to her hand, and general bruising and swelling that took months to heal. Even if appellant's attorney were able to rebut A.C.T.'s claim that she suffered nerve damage by calling a medical expert, there is ample remaining evidence for the jury to find that she suffered "other serious bodily harm" under the first-

degree assault statute. Minn. Stat. § 609.02, subd. 8. Furthermore, determining whether the pain in her hand was actually "nerve damage" does not rebut her testimony that she experienced sharp pain in her hands that interfered with everyday bodily function. Appellant's attorney's failure to call a medical expert does not raise a reasonable probability that, if she had called an expert, the outcome would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2052.

II. The district court did not abuse its discretion when it denied appellant's request for a continuance.

Appellant argues the district court abused its discretion by denying his request for a continuance in order for his attorney to have time to review the jail calls. A district court's decision to grant or deny a request for a continuance will not be reversed absent an abuse of discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). When reviewing such a decision, courts consider whether an appellant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial. *State v. Vance*, 254 N.W.2d 353, 358-59 (Minn. 1977).

The district court denied appellant's request for a continuance the day before trial. The court found that any prejudice created by denying the continuance with respect to the jail calls would be mitigated by the state providing the jail calls in a readily usable format for appellant to review. Second, the court gave some weight to the fact that appellant participated in the recorded conversations and knew the contents of the conversation. Last, the district court noted that, though the defense would be obtaining the jail calls in a readily

usable form the day before trial, there was enough time during jury selection for the defense team to determine if and how they wanted to use the jail calls at trial.

Our review of the relevant jail calls shows they contain two pieces of information that were potentially useful at trial. First, A.C.T. stated she did not believe that appellant intended to rape her, and second, A.C.T. told appellant she did not take ecstasy on the night of the offense. These two pieces of information are of little relevance to this case. At best, they could have been used to test A.C.T.'s credibility. However, A.C.T.'s testimony with respect to the events of the offense remained consistent from the day of the offense to trial, and she never recanted her testimony. Whether she believed appellant intentionally raped her or whether she took ecstasy that night are minor matters viewed alongside her detailed and consistent account of the offense. Additionally, appellant's attorney had the jail call files in her possession for four months before trial. Although she encountered technical difficulties in listening to the calls, she never contacted the state to obtain the files in a more readily usable format. Appellant's ability to prepare and present his defense was not prejudiced by the district court declining his request for a continuance the day before trial. Accordingly, the district court did not abuse its discretion in denying the continuance.

III. The district court did not err by denying appellant's request for a new trial.

Appellant argues the district court erred by denying his motion for a new trial premised on a *Brady* violation. Appellant claims the state failed to disclose information that A.C.T. believed appellant did not rape her. If the state possesses evidence favorable to the defense in a criminal case, it must disclose that evidence to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (Minn. 1963). The state has a duty to disclose any evidence it

possesses or controls that "tends to negate or reduce the guilt of the accused as to the offense charged." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005). To establish a *Brady* violation, appellant must show: "(1) the evidence at issue is favorable to the accused, either because it is exculpatory or it is impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) prejudice to the accused resulted." *State v. Brown*, 815 N.W.2d 609, 622 (Minn. 2012) (citing *Pederson*, 692 N.W.2d at 459).

With respect to the first *Brady* prong, the evidence at issue may be favorable to the accused because it would allow the defense to impeach A.C.T. based on her belief that appellant did not intend to rape her. Nevertheless, appellant's argument fails on the second and third prongs. For the second prong, the state did not suppress evidence that A.C.T. believed appellant did not intend to rape her. That evidence was disclosed to appellant when the state disclosed the jail calls. In the first jail call, A.C.T. says "I know you didn't intentionally do it. You just shouldn't have done it."[1] This jail call was played for the jury,

[1] The entire relevant portion of the recording is as follows (note, A.C.T. repeatedly refers to herself in the third person in an attempt to remain anonymous):

> I don't think you is . . . I don't, I don't think, I don't think, and I think that she, I think that she thinks that you didn't intentionally do that, you know what I'm saying? As meaning, no, you know what I'm saying, you probably, you know what I'm saying, felt like, okay, this will make her, you know I'm saying, feel better at the time, because y'all have had fights before, where y'all have had, you know I'm saying sex—where I do have sex but she does feel like you should have never did that, you know I'm saying? Especially in the condition that I was in. You know I didn't know what condition that I was in. You know I didn't know what condition I was in but you knew I was hurt . . . .

so the jury heard the evidence appellant claims was suppressed. Appellant argues that the evidence was revealed in a way that did "not afford the Defense a meaningful opportunity to review, investigate, and prepare." First, appellant had the jail-call recordings for four months and did not contact the state regarding its difficulties in listening to them. Second, the state highlighted to appellant the particular call he should review in preparing his case. Third, the district court ordered the state to provide appellant with a readily usable recording of the jail calls the day before jury selection and determined that appellant's counsel would have enough time to review the evidence before trial. Though appellant claims this was not enough time to meaningfully review the evidence, that argument is disingenuous considering the length and contents of the call. The relevant call is approximately 18 minutes long and would have been easily reviewable by appellant's attorney during the two days of jury selection before trial. Furthermore, there is no evidence that appellant's attorney never actually listened to the calls. The evidence was disclosed to appellant and was not suppressed by the state. Therefore, there is no *Brady* violation.

On the third element, appellant has failed to show prejudice posed by any alleged suppression of the evidence. As discussed above, the evidence had little probative value, and was unlikely to have had an impact on the outcome of the trial, given A.C.T.'s testimony against appellant. The district court did not abuse its discretion by finding there was no *Brady* violation and declining to grant appellant a new trial.

Affirmed.